BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KONGTHAKHOUNK THIDSORN	)	
Claimant	)	
VS.	)	
	)	Docket No. 177,005
EXCEL CORPORATION	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals from an Award rendered by Administrative Law Judge Kenneth S. Johnson on February 20, 1998. The Appeals Board heard oral argument September 23, 1998.

APPEARANCES

Seth G. Valerius of Topeka, Kansas, appeared on behalf of claimant. D. Shane Bangerter of Dodge City, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The single issue on appeal is the nature and extent of claimant's disability. The ALJ awarded benefits based on functional impairment and denied claimant's request for a work disability award. The ALJ did so on the grounds that claimant earned a comparable wage after the injury. On appeal, claimant contends he did not return to work at a comparable wage and is entitled to a work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be modified. Claimant is awarded benefits for an 11 percent functional impairment from the date of accident through the last day he worked for respondent, January 21, 1994, and for a 27 percent work disability thereafter.

Findings of Fact

1. Claimant sustained left shoulder and left upper extremity injuries arising out of and in the course of his employment for respondent. The parties have stipulated the date of accident was September 23, 1992.

2. Claimant treated with Dr. J. Mark Melhorn who performed left carpal tunnel and left cubital tunnel releases in May 1993.

3. Dr. Melhorn released claimant with permanent restrictions on July 2, 1993. He restricted against lifting and carrying more than 35 pounds maximum or 20 pounds frequently. He also recommended claimant limit to 6 hours of an 8-hour day repetitive tasks of grasping, pulling, pushing, fine manipulation, power grip, and use of power or vibratory tools. He also recommended claimant do no hook and knife work.

4. Claimant initially returned to work in the laundry room but in October 1993 respondent gave claimant a one-time opportunity to use his seniority to bump another employee off of a base job. Respondent's workers compensation coordinator, Susan Stephens, told claimant that he could choose a job but warned him that if he chose a job and either could not or would not do that job, claimant would be terminated. Claimant chose the "low temp belt" which he started November 22, 1993.

5. Dr. Melhorn viewed a video tape of the "low temp belt" job and stated in his November 3, 1993, note that the job appeared to fit within his guides but pointed out he could not say so to a reasonable degree of probability.

6. Claimant was examined and evaluated by Dr. P. Brent Koprivica on December 2, 1993. Dr. Koprivica concluded claimant should not continue doing the "low temp belt" job. Dr. Koprivica rated the right upper extremity but testified that if he considered only the left upper extremity, the impairment was 13 percent of the whole body. He recommended the following restrictions in his report:

> Mr. Thidsorn needs to avoid repetitive activities of either upper extremity on a permanent basis. Specifically, he should avoid repetitive pinching, forceful grasping, wrist flexion and extension, ulnar deviation of the wrist or use of air-driven tools. I do not believe he can use the hook or knife on a permanent basis. He also needs to avoid repetitive shoulder girdle activities. He should not do repetitive weighted or unweighted activities above shoulder level. The current activities appear to be activities which can result in further

> aggravation. Mr. Thidsorn gives a history of subjectively not tolerating these activities. Return to his prior laundry type of activities based on his description appears to be appropriate.

7. Claimant had problems working the "low temp belt" and claimant's attorney wrote respondent on January 12, 1994, advising respondent that claimant was having problems with the job:

> My client has indicated to me that the pain that he is experiencing is becoming intolerable and that he does not know how much longer he can work under the present conditions. I have advised him to continue working until we can get an accommodation.

8. On January 21, 1994, after receipt of the letter from claimant's counsel, respondent's representatives met with claimant and asked claimant if the statements in the letter were true. Claimant agreed that those statements were true and respondent immediately terminated claimant. Claimant asked if he could go back to the work in the laundry room and was told he could not.

9. After his termination on January 21, 1994, claimant was on unemployment until he went to work for CrustBuster/Speed King in August 1994. Claimant started there at $6 per hour and received several raises. At the time Ms. Karen C. Terrill interviewed claimant in November 1997, claimant was earning $8.14 per hour. This is the latest wage rate in evidence. The record does not show what, if any, overtime was worked at that rate. The record does show claimant received certain fringe benefits in the new job. CrustBuster paid $124 per month, or $28.62 per week, for health insurance, and $4.15 per month, or $0.96 per week, for life insurance, for a total of $29.58 per week. His average weekly wage in the new job was, therefore, $355.18 (base of $325.60 plus $29.58).

10. Claimant has also been examined and his injuries evaluated by Dr. James L. Gluck. Dr. Gluck saw claimant at the request of the ALJ for the purpose of an independent medical evaluation. Dr. Gluck rated the impairment as 11 percent of the whole body. He based his rating impairment on the left upper extremity only, but including the left shoulder. He also recommended restrictions as follows:

- can lift up to 50 pounds occasionally from floor to waist or carrying at waist level up to 100 feet
- no lifting overhead, that is above waist level more than 40 pounds on occasion and no frequent overhead lifting with left arm; no prolonged overhead at arm's length with left arm more than 15 minutes at a time with a total of 2 hours per day
- no repetitive grasping, pushing, or pulling with left hand

- limited use of vibratory tools with left hand, no more than 30 minutes at a time with a total of 3 hours per day

11. The Board finds claimant's injury and reasonable restrictions for that injury prevented claimant from continuing to do the work in the "low temp belt" position.

12. Claimant's ability to earn wages and ability to work in the open labor market were evaluated on behalf of claimant by Mr. Doug Lindahl. He concluded claimant's injuries resulted in a labor market loss of 75 percent. He also testified to a 14 percent loss of wage earning ability but it appears this opinion is based on an incorrect preinjury average weekly wage. He compared a preinjury wage of $382.42 with $330 per week which he understood claimant was making after the injury. The parties have stipulated to a preinjury average weekly wage of $439.67.

13. Claimant's wage and labor market loss were also evaluated by Ms. Terrill. She opined that based on Dr. Koprivica's restrictions, claimant has a loss of access to the labor market of 55 percent. Based on Dr. Melhorn's restrictions, the loss is 25 to 30 percent, and based on Dr. Gluck's restrictions, the loss is 20 to 25 percent. She gave no opinion as to ability to earn wages except to compare claimant's preinjury and postinjury wages.

Conclusions of Law

1. For claimant's date of accident, the Kansas Workers Compensation Act provided that a claimant could receive work disability benefits if the injury prevented claimant from remaining in the job he was doing and if claimant did not earn a comparable wage after the injury. K.S.A. 1992 Supp. 44-510e. The Act defined work disability in terms of loss of ability to earn wages and loss of ability to access the open labor market. K.S.A. 1992 Supp. 44-510e.

2. A claimant who earns a comparable wage after the injury is limited to disability based on functional impairment. K.S.A. 1992 Supp. 44-510e.

3. A claimant who refused to attempt an appropriate comparable wage job offered to claimant is treated as though he/she earned a comparable wage. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). But if a claimant attempts to perform a job offered but is not able to do so because of his/her injury, the claimant may be entitled to a work disability. Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

4. The Board finds claimant is entitled to benefits, based on the 11 percent functional impairment rating of Dr. Gluck, from the date of accident of September 23, 1992, to the date claimant was terminated from employment with respondent, January 21, 1994.

5. The Board finds claimant did not refuse to attempt accommodated work and claimant is entitled to benefits based on a work disability beginning January 22, 1994, and continuing thereafter.

6. The Board finds claimant has a 19 percent loss of wage earning ability. This finding is based on a comparison of what claimant was earning at the time of the accident, $439.67, and what claimant was able to earn in his new employment, $355.18.

7. The Board finds claimant has a 35 percent loss of ability to obtain and retain employment in the open labor market. This finding is based on the opinions of Ms. Terrill and represents an average of the three opinions based on three physicians, Drs. Koprivica, Melhorn, and Gluck. The Board has not factored in the opinion by Mr. Lindahl because the Board agrees with the analysis by the ALJ on this question. The ALJ discounted Mr. Lindahl's opinions because Mr. Lindahl arrives at the same labor market loss based on significantly different restrictions. The Board finds the opinions by Ms. Terrill more accurate.

8. The Board finds claimant has and is entitled to benefits based on a 27 percent work disability. The work disability percentage has been arrived at by giving equal weight to the labor market and wage ability losses as authorized in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Kenneth S. Johnson on February 20, 1998, should be, and is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Kongthakhounk Thidsorn, and against the respondent, Excel Corporation, a qualified self-insured, for an accidental injury which occurred September 23, 1992, and based upon an average weekly wage of $439.67, for 0 weeks of temporary total disability compensation, followed by 69.29 weeks at the rate of $32.24 per week or $2,233.91 for an 11% functional impairment for the period September 24, 1992 through January 21, 1994, followed by 345.71 weeks at the rate of $79.14 per week or $27,359.49 for a 27% permanent partial disability beginning January 22, 1994, making a total award of $29,593.40.

As of October 15, 1998, there is due and owing claimant 69.29 weeks compensation at the rate of $32.24 per week or $2,233.91 for an 11% functional impairment, followed by 246.86 weeks at the rate of $79.14 per week in the sum of $19,536.50, for a 27% permanent partial disability, for a total of $21,770.41 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $ 7,822.99 is to be paid

for 98.85 weeks at the rate of $79.14 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Seth G. Valerius, Topeka, KS
D. Shane Bangerter, Dodge City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director